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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929; No. 528.

BROAD RIVER POWER CO., ET AL., - Petitioners,

vs.

STATE OF SOUTH CAROLINA, ET AL.

On Writ of Certiorari to the Supreme Court of South Carolina.

BRIEF FOR PETITIONERS.

A street railway company having operated for years at a "devastating loss" can abandon its entire business and franchise; and the State can not compel it to operate and pay its losses out of its electric light franchise business.

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Supreme Court of the United States

OCTOBER TERM, 1929; No. 528.

BROAD RIVER POWER CO. ET AL., - - *Petitioners,*

vs. [ORALLY ARGUED MAY 2, 1930.]

STATE OF SOUTH CAROLINA ET AL.,

On Writ of Certiorari to the Supreme Court of South Carolina.

BRIEF FOR PETITIONERS.

[REFERENCES REQUIRED BY RULE 25.]

(1) The opinion below [*South Carolina* v. *Broad River Power Co.,* S. C. (unreported as yet) R. 203-251; dissenting opinion R. 251-265] and the judgment thereon (R. 251) were both rendered July 9, 1929, directing the Broad River Power Co. (hereafter called Broad River) and the Columbia Railway Gas & Electric Co. (hereafter called Consolidated Co.) to resume permanent operation of an electric street railway system in Columbia, S. C.; permanently enjoining them from abandoning it; and holding both companies jointly responsible for its future operation (R. 8).

(2) The jurisdiction of this Court was invoked by a writ of *certiorari,* granted January 27, 1930, to review the above cause (280 U. S. 96A; Act Feb. 13, 1925, c. 229, §1, 43 Stat. 937; Jud. Code 237(b); 28 U. S. C. A. §344).

THE QUESTION INVOLVED.

The question involved here is whether, under the "due process" clause, South Carolina can compel one or both of those two public utility corporations to resume permanent operation of a street railway system in Columbia, S. C., operation of which had been abandoned in 1927, because during the last seven years of its operation, it had been run at an actual loss of over $675,000, before making provision for either depreciation or for return on the investment.

The State contends that by the Consolidated Co.'s Charter, by City ordinances permitting the use of the streets, and by certain private contracts with land development companies, the company contracted to operate the street railway, regardless of whether its operation could only be had at an enormous financial loss.

The company contends that, despite economical and efficient management, the street railway has not been, and cannot be, operated, except at a tremendous financial loss, averaging nearly $100,000 cash loss per year, without any provision for depreciation or return on the investment; that for the State to compel it to continue operation under such circumstances constitutes a taking of its property without due process of law; and

that it had the right to abandon operations and withdraw its property from the public service, and realize what it could from its salvage value.

STATEMENT OF THE CASE.

1. *In 1882 the Columbia Street Railway Co. was incorporated.* In 1882, South Carolina chartered the Columbia Street Railway Co. (hereafter called the Horse Car Co.),* with power to construct street car tracks through the City of Columbia and five miles beyond the city limits, and to operate a street railway for thirty years (Acts 1882, p. 876; R. 817).

Neither the State Constitution nor Statute required any consent from the city of Columbia. Nothing was done until 1886.

2. *The 1886 Ordinance of City of Columbia.* In 1886, Columbia passed an Ordinance authorizing the Horse Car Co. to lay its tracks on the city streets (which had already been fully authorized by the State Legislature, regardless of the City's consent); and prescribed how the tracks should be laid and the cars operated, with various penalties by fine or imprisonment for violations thereof (R. 833-837).

3. *In 1887 Congaree Gas & Electric Co. was incorporated.* In 1887, South Carolina chartered the Con-

*On account of the confusing similarity in the names of numerous companies each beginning with the word "Columbia," they will be designated herein by short titles expressive of their nature.

garee Gas & Electric Co. (hereafter called Congaree Co.) with

> "full power and authority to manufacture, make and sell gas, . . . and . . . to carry on and conduct the business of using electricity for any purpose, and of manufacturing light, heat and power, . . . by electricity . . . for lighting and heating the streets, roads, [etc.] . . ." (Acts 1887, p. 1103; R. 813).

The Congaree Co. conducted its electric lighting business until 1891.

4. *In 1890 the original Electric Street Railway Company was incorporated.* In 1890, the Columbia Electric Street & Suburban Railway and Electric Power Co. (hereafter called Original Electric Ry. Co.) was incorporated, but never engaged in any operations (Acts 1890, p. 959; R. 811).

5. *The Consolidation Act of 1891.* In 1891, South Carolina passed a Consolidation Act, which authorized the consolidation of the Original Electric Ry. Co. with the Congaree Co., into a *consolidated* corporation, to be called Columbia Electric Street Railway, Light & Power Co.* (hereafter called the Consolidated Co.), and authorized such Consolidated Co. to purchase the original Horse Car Co. (Acts 1891, p. 1453; R. 809).

This Consolidation Act provided that the Original Electric Ry. Co. and the Congaree Co.

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*The Consolidated Co. later changed its name to Columbia Railway, Gas & Electric Co., which is one of the petitioners on this Writ of *Certiorari;* and it will continue to be referred to as the Consolidated Co.

"be, and they hereby are, *authorized to consolidate* their property, franchises and privileges into one company, under the name of 'The Columbia Electric Street Railway Light and Power Company,' such consolidation to be effected by a deed of indenture, to be executed by the two consolidating companies, declaring their intention so to consolidate, and transferring to said consolidated company all of the property, franchises, rights and privileges owned or held by each of them respectively.

"Section 2. That upon such consolidation 'The Columbia Electric Street Railway Light and Power Company' shall be vested with all the rights, franchises, powers and privileges conferred upon the consolidating companies [by the charters] . . . and that said consolidated company be subject to all of the debts and liabilities of the two consolidating companies; and that said consolidated company be authorized and empowered to purchase and acquire the property, franchise, and privileges of 'The Columbia Street Railway Company' [original Horse Car Co.], and upon such purchase said consolidated company be vested with all the rights, powers, franchises, and privileges conferred by [the 1882 Act incorporating the original Horse Car Co.]."

Pursuant to the Consolidation Act, (1) the Original Electric Ry. Co. and the Congaree Co., by proper indenture, *were consolidated* into the Consolidated Co.; and (2) the Consolidated Co. thereupon *purchased* the property, franchise and privileges of the original Horse

Car Co. and became vested with all of the latter's "rights, powers, franchises and privileges conferred by" the 1882 Act incorporating such Horse Car Co.

6. *The 1892 Ordinance of Columbia, giving its consent to the construction of the Electric Street Railway in its streets.* By an 1892 Ordinance, Columbia gave its consent to the Consolidated Co. to use electricity as a motive power for its cars on the City streets (§562; R. 838; Cf. R. 812, §5).

7. *Consolidated Co.'s operation (1892-1925) of the respective Railway and Electric Systems.* The Consolidated Co. having, as above explained, acquired the three separate franchises, to-wit: (1) electric railway from one constituent, (2) electric light and power from the other constituent, and (3) the original Horse Car franchise by purchase, it abandoned the horse car operations, continued for 33 years (1892-1925) to operate (*a*) an electric railway in Columbia, and for several miles beyond the city limits, and (*b*) an electric light and power system in that City and vicinity.

Private extension contracts. In 1900-1910, the Consolidated Co. made contracts with three suburban land development companies, under which it built certain extensions of its lines, the cost of two of which the Consolidated Co. bore. South Carolina claims that by those contracts the Consolidated Co. became obligated to the public to maintain its street railway system in perpetuity in connection with those extensions and regardless of losses. (See pages 40-48, *infra.*)

8. *Consolidated Co.'s heavy losses in the operation of the electric railway system during 1920-1925.* Beginning about 1912, the increasing use of private automobiles caused a country-wide decline in the profitableness of electric railways; and during the years 1920-1924, the Consolidated Co.'s electric street railway system showed an enormous out-of-pocket cash loss. Its actual operating expenses exceeded its receipts by $528,803.91 (R. 1119; 1125; 426):

Year	Actual cash losses in operation
1920	$ 94,533.64
1921	49,232.73
1922	144,513.21
1923	102,477.28
1924	138,047.05
	$528,803.91

The above losses included no charge for depreciation. If $25,000 a year be allowed for depreciation (which is only half of that proved (R. 59, 539, 606), the deficit for those five years would be $653,803.91—without any provision for a return on the $1,750,000 investment, estimated on reproduction cost (R. 154, 539).

These inevitable losses in street railway operation, were, in the case of the City of Columbia, further aggravated by a strike in 1922; followed by continuous and practically unrestrained "jitney" competition largely conducted by discharged strikers, which competition was countenanced by the City authorities who licensed approximately 200 jitneys a year (R. 522), in addition to a number of taxicabs (R. 521-2).

9. *Organization of the Broad River Power Company, and its subsequent expansion and development, including its acquisition of the Consolidated Co.'s electric and gas properties—the Consolidated Co. retaining its electric street railway.* In July, 1924, the Broad River Power Company was incorporated as a South Carolina corporation, with a nominal capitalization, for the purpose of conducting a gas and electric business.

In the latter part of 1924, its nominal capitalization was increased to 22,000 shares of Common Stock and 12,500 shares of Preferred Stock, of which $1,250,000 of Preferred Stock and $2,199,300 of Common Stock, with $449,000 cash, were used by Broad River to acquire common and preferred stock of the Consolidated Co. and the preferred stock of one of the latter's subsidiaries (R. 672). The details of Broad River's acquisition in June, 1925, of the Consolidated Co.'s electric and gas properties and subsidiaries, will be noticed presently (pages 9-11, *infra*).

From time to time, Broad River issued (and sold through investment bankers) its preferred stock and bonds, with the proceeds of which, it erected a $4,000,000 power plant at Parr Shoals, and made many additions, extensions, improvements and betterments, at an aggregated cost of around $10,000,000 (R. 666), until at the time of the trial below, its outstanding capitalization [exclusive of the funded debt of the Consolidated Co. the payment of which Broad River assumed], was as follows (R. 673; 611):

Preferred stock	$3,810,500
Common stock	4,329,400
First mortgage bonds	5,764,070
Sinking fund bonds	1,385,625
	$15,289,595

All of the bonds and preferred stock are held by the general public (R. 611). The total value of its properties is about $20,000,000.

The Enabling Act of March 19, 1925.

On March 19, 1925, South Carolina passed an Act (for brevity called the Enabling Act) by which the Consolidated Co. and six of its subsidiaries were severally (R. 806):

> "*authorized* to merge or consolidate with or *to sell,* transfer and convey to any one or more of them or *to the Broad River Power Company* all or *any part* of their respective properties, assets, franchises and charter or other rights, and each and every of said companies and the Broad River Power Company are hereby authorized to merge or consolidate with or *to purchase and to receive and hold* all or *any part* of the properties, assets, franchises and charter or other rights of any other of said companies so sold, transferred and conveyed to it . . . and each and every company so merging or consolidating with *or becoming the purchaser of* any of such property, assets, franchises, charter or other rights *is hereby declared to be vested* with the same and all such mergers, consolidations, *sales, transfers and conveyances*

are hereby validated and confirmed: PROVIDED That all such mergers, consolidations, sales, transfers and conveyances shall be made without prejudice to any claim for taxes or any rights of any creditors of the companies so selling.

"Section 2. That in furtherance of the purposes of Section 1 of this act, it is hereby declared that *all franchises heretofore granted by the State* to any of the said companies *may be transferred and assigned* in pursuance of the provisions of Section 1 of this Act, and *that said franchises are hereby ratified, confirmed and continued in full force and effect in the company, to which the same shall be so transferred and assigned* and that such company shall hold the same with all the rights, powers and privileges granted to the original holder thereof, *subject only* to the restrictions, requirements and conditions in said franchises contained."

On June 15, 1925, the Consolidated Co.'s several gas and electric subsidiary corporations first conveyed their properties to the Consolidated Co., and simultaneously therewith, the Consolidated Co. conveyed, in turn, all of its properties (including those just acquired from its subsidiaries) to Broad River; *except,* that the Consolidated Co. expressly retained its street railway franchises, easements, rights of way, rolling stock and railway equipment, by the following express reservation (R. 1116):

"Columbia Railway, Gas and Electric Company expressly retains the following:

(*a*) Its franchises to operate and maintain its street railway in the County of Richland State of South Carolina, within and without the City of Columbia and other municipal corporations in said County.

(*b*) All easements, rights of way, rights and privileges necessary for operation of said street railway.

(*c*) All street cars, tracks, ties, overhead conductors, bracket, spans, tools, repair equipment, material and supplies used or useful exclusively for street railway purposes.

(*d*) All that lot or parcel of land situate in the County of Richland, State of South Carolina, and more particularly described and bounded as follows: [A strip 30 feet wide 1115 feet long, running from the Harper lands to the State A. & M. Society]."

The effect of the Enabling Act, and the action taken thereunder, was that Broad River acquired by deed all of the Consolidated Co.'s *gas and electric* properties; while the *Consolidated Co. retained* its electric street railway franchises, tracks, rights of way, rolling stock and equipment.

10. *The Consolidated Co.'s continued losses in the operation of its street railway system (1925-1927).* The Consolidated Co. and the State Railroad Commission, by a series of measures [such as raising fares, adopting a zoning system, eliminating unprofitable lines, giving free transfers, selling tickets at reduced rates, and decreasing expenses in various ways], endeavored to put the railway on a paying basis, so that the street car

system might continue in operation (R. 541-544); but heavy losses continued until March 11, 1927, when the street railway operation was abandoned (R. 541).

The actual cash losses in the operation for 1925-1927 were as follows (R. 1119):

1925	$87,812.13
1926	47,630.35
1927 (2 months)	10,953.08
	$147,395.56

This was an actual $147,395.56 operating cash loss in a little over two years, without any provision for depreciation or return on the investment.

The $675,199.47 losses for the 7 years and 2 months (January 1, 1920-March 1, 1927) may be thus summarized (R. 1119):

1920	$ 94,533.64
1921	49,232.73
1922	144,513.21
1923	102,477.28
1924	138,047.05
1925	87,812.13
1926	47,630.35
1927 [2 months only]	10,953.08
Total of cash operating loss January 1, 1920-March 1, 1927	$675,199.47

If to this be added $25,000 annual depreciation charge [which is only 50% of what was proved to be a proper depreciation charge, R. 159], aggregating $179,166.66, the actual operating loss reached the enormous sum of $854,366.13, without any return whatever

upon the $1,750,000 investment (valued at reproduction cost) which at 7% over a period of seven years amounts to $875,000.

In less than two years (July 1925-March 1927, Broad River made $115,000 advances to its subsidiary (Consolidated Co.) to enable the latter to continue operating the street railway in the face of these heavy losses (R. 1126; Fol. 1408).

11. *The Consolidated Co. abandoned street car operation on March 11, 1927.* Finally Broad River decided to make no more advances to aid the Consolidated Co. in keeping the railway system in operation; and on March 11, 1927, the Consolidated Co. (having no other means of obtaining funds, and having exhausted its entire resources, stopped operation of its street car system, which has not been operated since that date (R. 541).

The State Railroad Commission investigated this discontinuance of the street railway service in Columbia; and after full proceedings it found that "the unregulated, unrestricted system of jitney transportation has utterly destroyed the street railway system of Columbia"; "that the Company's losses from 1922 to 1927, amounted to more than $500,000, not including interest and depreciation;" that continued street car operation could only be had if Broad River would stand the losses of operation, which it could not do without hampering its other utility services and damaging the community in other respects. Thereupon, on April 7, 1927, the State Railroad Commission ordered that the

Consolidated Co.'s request to discontinue its entire street railway service be granted (R. 819-825).

12. *History of the litigation.* On July 19, 1927, the Attorney General of South Carolina filed a petition for *mandamus* in the Supreme Court of South Carolina (as a court of original jurisdiction), seeking to hold the Consolidated Co. and Broad River, jointly responsible for the permanent operation of the street car system in Columbia, to require them to resume such operation, and to permanently enjoin them from abandoning it in the future (R. 2-8).

A few days later, the State Railroad Commission (a change in *personel* having occurred), delivered a new opinion and ordered the Consolidated Co. to resume its street car service (R. 825-831).

The State Railroad Commission, one individual, and certain private corporations and public bodies, were permitted to intervene (R. 39-94). The case was referred to a Special Referee, who took a large amount of oral and documentary testimony, and filed an elaborate Report recommending that all the petitions be dismissed, upon the ground that to compel the Consolidated Co. and Broad River to operate the street railway at an enormous loss would violate the Fourteenth Amendment (R. 130-196).

On exceptions to the Report, the Supreme Court of South Carolina adjudged that the writ of *mandamus* should issue as prayed for (R. 204-251), COTHRAN, J. dissenting, in a careful opinion (R. 251-265).

The Consolidated Co. and Broad River filed a Petition for Rehearing, pointing out many errors in the Court's opinion (R. 266-271), but it was overruled (R. 272).

A writ of *certiorari* was granted, 280 U. S. 96A.

SPECIFICATION OF ERRORS.

The Supreme Court of South Carolina erred in holding:

1. That the Consolidated Co.'s street railway business, if properly managed, could be conducted at a profit (R. 250; 242, 244-250).

2. That the Consolidated Co.'s charter, the City Ordinances granting the use of its streets, and private contracts for line extensions, constituted contracts requiring the Consolidated Co. to operate its street railway, regardless of losses (R. 221, 237, 239-241).

3. That the Consolidated Act of 1891 constituted a grant of a combined franchise for street railway, electric and gas services, no part of which could be abandoned so long as any other part was exercised (R. 221, 222, 214-215, 218).

4. That the electric and gas business operated by the Broad River Power Co. was conducted at a profit, and, therefore, prevented the Consolidated Co. from abandoning its street railway service on account of losses in operation (R. 218).

5. That the Broad River Power Co. was jointly responsible for the operation of the street railway system (R. 13).

SUMMARY OF POINTS DISCUSSED.

1. The street railway system in Columbia has for years been operated at a "devastating loss," and it can never be operated otherwise than at a heavy loss.

South Carolina cannot compel the Consolidated Co. to operate this street railway system at such a loss—for to do so would take the Company's property without "due process" of law (page 17, infra).

2. The Consolidated Co.'s street railway system was properly managed; and it cannot under any circumstances be operated otherwise than at a heavy loss (page 24, infra).

3. None of the Charters, City Ordinances granting permission to use the streets, private contracts for line extensions, or right of way grants, constitute any contract which obligated the Consolidated Co. to operate the street railway system, regardless of losses (page 26, infra).

4. The Consolidated Co. possessed two separate and independent franchises—one for electric light and power derived from the Congaree Co. and the other for an electric street railway system derived from the Original Electric Ry. Co.

If either franchise could not be operated, except at a loss, the Company could abandon such franchise, while retaining and operating its other independent franchise (page 49, infra).

5. The Broad River Power Co. purchased the electric light and power franchise from the Consolidated Co. pursuant to express statutory authority; and it cannot be compelled to operate a street railway system which it never purchased (page 62, infra).

FIRST POINT.

The street railway system in Columbia has for years been operated at a "devastating loss," and it can never be operated otherwise than at a heavy loss.

South Carolina cannot compel the Consolidated Co. to operate this street railway system at such a loss,—for to do so would take the company's property without "due process" of law.

1. From January 1, 1920, to March 1, 1927, the actual *cash operating loss* of the Consolidated Co. in the operation of the railway system, was $675,199.47, without making any provision for depreciation or for a return on the company's investment (R. 1119), During the last two years of operation, the Consolidated Co. had to borrow $115,000 in order to take care of the cash deficit in operation, and only suspended operations when it could survive no longer (R. 1126, 554). If it had made even the very moderate charge of $25,000 a year for depreciation (which is only 50% of what was proved to be a proper depreciation charge R. 159), such depreciation charges would have amounted to $179,166.66, thus bringing up the actual operating loss in seven years to $854,366.17—still without any provision for a return on the investment.

The Special Referee thus summarized the evidence regarding the losses (R. 158):

> "The evidence clearly shows that for a number of years the street railway business in the City of Columbia has been operated at a heavy loss. Exhibit A-19

[R. 1118-1119], which is a summary from the books of the railway company, indicates that the operating loss before depreciation or interest from January, 1920, to February, 1927, inclusive, amount to $675,199.47. This statement includes charges for 'power purchased,' which is an interdepartment or intercompany charge, and petitioners [South Carolina] contend that this charge should be eliminated or at least greatly reduced. There was also testimony that the power company charged the railway company a much higher rate than it did the Pacific Mills. The Referee does not consider it necessary to discuss the testimony pro and con in regard to this rate. Even at the minimum rate the losses run into very high figures. This statement also includes for the period since the conveyance to Broad River Power Company a charge for pole rental. The following is a statement by years compiled from Exhibit A-19 showing the losses, including 'power purchased' and excluding 'power purchased'; and deducting the entire amount for pole rental:

Years	Losses, including "power purchased"	Losses, excluding "power purchased"	Gains, excluding "power purchased"
1920	$ 94,533.64	.....	$ 9,510.96
1921	49,232.73	.....	17,892.19
1922	144,513.21	$91,906.41	.....
1923	102,477.28	42,164.38	.....
1924	138,047.05	80,834.05	.....
1925	87,812.13	41,651.33	.....
1926	47,630.35	20,125.75	.....
Jany. and Feby. 1927	10,953.08	7,052.48	.....
Totals	$675,199.47	$283,734.40	$27,403.15
Less gains 1920 and 1921		27,403.15	
		$256,331.25	
Less pole rental		3,498.89	
Total losses, excluding "power purchased" and pole rental		$252,832.36	

"Of course, it would not be proper to eliminate the power charge entirely, because the actual cost of the power would in any view of the case be a proper charge. This also might apply to some charge for pole maintenance.

"It will be borne in mind that the foregoing statement covers operating losses only without any provision whatsoever for depreciation and without any allowance whatsoever for interests or earnings on the investment. The testimony on behalf of respondents [Consolidated Co.], was that at least $50,000 a year would be a proper charge for depreciation. Even if this charge for depreciation is reduced by half, the total of such charge over the period of years would amount to about $175,000, which would raise the entire loss on the basis of the above minimum statement to

over $400,000, with no provision for any return on the investment. It will be noted that the losses appear to have commenced in 1920, although the strike above referred to was not until 1922. It is true that the above statement shows that eliminating the power purchased there were small gains in 1920 and 1921, but this would be entirely wiped out by a minimum charge on account of depreciation. . . .

The Referee is constrained to the conclusion as a matter of fact that after taking into consideration all of the evidence the street car system in the City of Columbia has been running at a *devastating loss* over a period of years, and that this loss commenced some time before the intervention of the Barstow interests. Not only were the investors receiving no return from the railway system, but without allowance for depreciation, the 'out of pocket' loss was running up into high figures. It was testified on behalf of respondents [Consolidated Co.], that it would cost from $550,000 to $600,000 expended over a period of two or three years to put the system in operation, and that of this amount $125,000 would have to be expended in a very short period in order to operate a few cars; and that about $65,000 would be necessary to make repairs on the tracks.'"*

The testimony as to these losses was absolutely uncontradicted (R. 541-547, 557, 558, 579, 598, 601, 602, 743, 1119, 1125. See also detailed EXHIBITS folded in after R. 1118).

*The Supreme Court of South Carolina's statement (R. 244) that there was a profit in 1923-1924, is simply a plain error. It first gives the figures of the electric *light and power* profits for those years, and then erroneously states that such profit was derived from the *street railway* (Compare R. 267, 1122; fol. 1400, Exhibit A-25).

2. The law is well settled that where a street railway business is run at a constant loss, it may surrender its franchise to do such business and abandon its lines (unless it has, by contract, bound itself to operate, regardless of losses).

In *Brooks-Scanlon Co.* v. *R. R. Comm.*, 251 U. S. 396, 399, it is said:

> "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. On this point it is enough to refer to *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595, 599, 600, 604, and *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605, 609, 614. . . . If the plaintiff be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. *Munn* v. *Illinois*, 94 U. S. 113, 126."

In *Railroad Comm.* v. *Eastern Tex. R. R.*, 264 U. S. 79, 85, it is said:

> "The usual *permissive charter* of a railroad company *does not give rise to any obligation* on the part of the company *to operate its road at a loss.* No contract that it will do so can be elicited from the acceptance of the charter or from putting the road in operation. The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the com-

pany may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law. The controlling principle is the same that is applied in the many cases in which the constitutionality of a rate is held to depend upon whether it yields a fair return. *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana,* 251 U. S. 396, 399; *Bullock* v. *Railroad Commission of Florida,* 254 U. S. 513, 520; *State, ex rel. Cunningham* v. *Jack,* 113 Fed. 823; s. c. 145 Fed. 281; *Iowa* v. *Old Colony Trust Co.,* 215 Fed. 307, 312; *Northern Pacific R. R. Co.* v. *Dustin,* 142 U. S. 492, 499; *Commonwealth* v. *Fitchburg R. R. Co.,* 12 Gray, 180, 190; *State* v. *Dodge City, etc., Ry. Co.,* 53 Kan. 329, 336."

In *Bullock* v. *R. R. Comm.,* 254 U. S. 513, 520, it is said:

> "Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss, if there is no reasonable prospect of profitable operation in the future. *Brooks-Scanlon Co.* v. *R. R. Comm. of Louisiana,* 251 U. S. 396. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State and have been allowed to exercise the power of eminent domain."

See also *Fort Smith Traction Co.* v. *Bourland,* 267 U. S. 330, 333.

3. It is plain, therefore, that the Consolidated Co. was entitled to abandon its street railway in Columbia, and salvage what it could from the wreck, by junking it or otherwise, unless the case falls within one or the other of two recognized exceptions to the general rule, to be noticed hereafter (p. —, *infra*).

ANALYSIS OF THE SOUTH CAROLINA COURT'S OPINION.

The State Court endeavored to avoid the above well recognized rule by holding that:

1. The street railway system, if properly managed, could be operated at a profit, instead of at a loss (R. 242-250).

2. The charter, City Ordinances, private contracts for line extensions and right of way grants, constitute contracts obligating the street railway company to operate, regardless of losses (R. 214 et seq. as to charters; R. 236 as to City Ordinances; R. 239-241 as to extension line contracts and rights of way).

3. The Consolidated Co.'s franchise was a combined and inseparable franchise for electric light, power and street railway service jointly, no portion of which could be abandoned so long as any other portion was exercised (R. 218 *et seq.*); and the Broad River's purchase of the electric light power franchise from the Consolidated Co. [notwithstanding express statutory authority Enabling Act R. 806], was wholly ineffective to keep the electric light and power fran-

chise separate from a surrendered street railway franchise (R. 213).

These contentions will be considered in order.

SECOND POINT.

The Consolidated Co.'s street railway system was properly managed, and cannot under any circumstances be operated otherwise than at a heavy loss.

In response to the South Carolina Court's suggestion that the Columbia street car system, if properly managed, *could* be operated at a profit, it is sufficient to observe:

1. In response to a similar suggestion advanced in the *Brooks-Scanlon Co.* case, 251 U. S. at 400, this Court said:

> "This is merely the *language of hope.* We cannot take it to be a finding of fact, for we perceive nothing in the evidence that would warrant such a finding."

2. There is no evidence by anyone experienced in street car operations, either that the system could be operated at a profit or that anything could be done to improve the methods of operation with the funds available—all funds having been more than exhausted in the effort to keep the system going in face of a heavy loss.

The only witness on this point for the State was a City Councilman, who said that if competition were removed and the road improved he thought they might

be able to make a little money (R. 438, 442). Such testimony cannot over-balance the testimony of experienced operators (R. 545, 502, 536, 537, 541, 543-547, 570, 731, 732, 735) and the hard fact that the Company lost hundreds of thousands of dollars for seven years and had to borrow large sums to continue operation. Common sense and business experience prove that corporations do not deliberately lose $100,000 a year for a long series of years if it can possibly be avoided.

3. Similarly, the Railroad Commission's opinion (during the pendency of this case), that by proper management the street railway could be made to yield a fair return, was a mere expression of opinion, without any basis in fact to support it (R. 829); and in any event, its opinion *pendente lite* is not competent evidence and can be given no probative effect in this litigation (*Ohio Valley Co.* v. *Ben Avon Borough,* 253 U. S. 287; *Okla. Operating Co.* v. *Love,* 252 U. S. 331; *Bluefield Water Wks. Co.* v. *Pub. Ser. Comm.,* 262 U. S. 679).

The question here involved is not as to the enforcibility of any order of the Railroad Commission, but is whether its expression of opinion *pendente lite,* can be given any evidentiary effect in a pending judicial proceeding where the same question is being subjected to judicial review. Such a statement by the Railroad Commission was pure hear-say, not under oath and not subject to cross-examination.

THIRD POINT.

None of the charters, city ordinances granting permission to use the streets, private contracts for line extensions, or right of way grants, constituted any contract which obligated the Consolidated Co. to operate the street railway regardless of losses.*

1. *The statutory charters.* (*a*) The 1890 charter of the Original Electric Ry. Co. was purely *permissive* in character, contained no rate provision whatever, and imposed no special obligation of any kind on the Company to operate, other than exists under the general corporate rule. The 1890 charter language was as follows (R. 812):

> "Section 5. That the said company shall have power to construct or acquire single or double railway tracks, or such gauge as they may elect, through any street or streets of the City of Columbia, *with consent of City Council,* and to extend the same five miles into the country, in any direction or directions they may wish, from the State Capitol. And the said company is authorized and empowered to contract for and provide electric power for any other purpose or purposes.
>
> Section 6. That said company shall have power to operate their cars in the transportation of passengers and freight over the tracks they may construct or acquire, in said city, with electric power, in suitable carriages, and at such rates as may be fixed upon in the by-laws of the same."

*Whether any contract existed and its terms are questions which this Court determines for itself (*Georgia Ry. & Power Co.* v. *Decatur*, 262 U. S. 432; *R. R. Comm.* v. *Eastern Tex. R. R. Co.*, 264 U. S. 79).

No argument is necessary to show that such general permissive language did not impose any *obligation* on the Company to operate regardless of losses (*Bullock* v. *R. R. Comm. of Fla.*, 254 U. S. 513, 520, 521; *R. R. Comm.* v. *Eastern Texas R. R. Co.*, 264 U. S. 79, 85).

(*b*) The Consolidation Act of 1891 (R. 809) authorized the Congaree Co. [which had an electric light and power franchise R. 813], to consolidate with the Original Electric Ry. Co. for the purpose of forming a new Consolidated Co. The Consolidation Act provided (R. 809, Section 2):

> "Section 1. BE IT ENACTED *by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same,* That the 'Columbia Electric Street and Suburban Railway and Electric Power Company' [Original Electric Ry. Co.] and the 'Congaree Gas and Electric Company' [Congaree Co.] be, and they hereby are, authorized to consolidate their property, franchises and privileges into one company, under the name of 'The Columbia Electric Street Railway, Light and Power Company' [Consolidated Co.], such consolidation to be effected by a deed of indenture, to be executed by the two consolidating companies, declaring their intention so to consolidate, and transferring to said consolidated company all of the property, franchises, rights and privileges owned or held by each of them respectively.
>
> "Section 2. That upon such consolidation 'The Columbia Electric Street Railway, Light, and Power Company' [Consolidated Co.] shall be vested with all

the rights, franchises, powers and privileges conferred upon the consolidating companies by an act entitled *'An Act to incorporate the Congaree Gas and Electric Company,'* approved December 24, A. D. 1887, and by an Act entitled *'An Act to incorporate the Columbia Electric Street and Suburban Railway and Electric Power Company,'* approved December 24, A. D. 1890, or any Acts amendatory thereof, and that said consolidated company be subject to all of the debts and liabilities of the two consolidating companies; and that said consolidated company be authorized and empowered to purchase and acquire the property, franchise and privileges of 'The Columbia Street Railway Company,' [Horse Car Co.] and upon such purchase said consolidated company be vested with all the rights, powers, franchises, and privileges conferred by an Act entiled *'An Act to incorporate the Columbia Street Railway Company,'* approved February 9th, A. D. 1882; but such purchase to be without prejudice to creditors of The Columbia Street Railway Company [Horse Car Co.] to enforce their rights against said Columbia Street Railway Company'' [Horse Car Co.].

The two companies were consolidated under that authority. There is certainly nothing in that Consolidation Act which imposes upon the new Consolidated Co. *anything more* than that which *already existed* with respect to the constituent Original Electric Ry. Co. There is certainly nothing in the Consolidation Act which can be strained or twisted into creating a contract to operate the street railway system *regardless of losses.* It is a simple example of the consolidation of two companies into a new consolidated company,

which does not impose or grant to the new company anything more than or different from that formerly possessed by the constituents.

It follows, therefore, that the Consolidated Co. acquired nothing more than the pre-existing *permissive* franchises belonging to its two constituents. As they did not impose any contract to operate at a loss (p. 26, *supra*), it necessarily follows that the Consolidated Co. was under no contract to operate at a loss.

(*c*) The 1925 Enabling Act (which authorized the Consolidated Co. and certain of its subsidiaries to sell in whole or in part to Broad River (R. 806), did not purport to do anything more than to give statutory authority for such sale, transfer, merger or consolidation, which prior statutory authority was essential to any of those transfers, etc. No one claims that such authority constituted in any sense a contract *obligation* upon any company to operate regardless of losses.

(*d*) With respect to each of the foregoing statutes, it must be borne in mind that it prescribed *no rates of fare,* and used *no language* whatsoever indicating any obligation upon the corporation which it created, to operate for any specific length of time, or indeed to operate under any conditions other than those imposed by general corporate law. There is nothing in any of the foregoing statutes which creates any special contract or does anything to take it out of the general rule laid down in *R. R. Comm.* v. *Texas R. R. Co.,* 264 U. S. 79, 85, that,

"The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but *on condition* that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return. And if at any time it develops with reasonable certainty *that future operation must be at a loss,* the company may *discontinue operation* and get what it can out of the property by dismantling the road."

2. *The city ordinances.* After South Carolina had granted to the Original Electric Ry. Co. a charter to use the streets of Columbia "with consent of City Council" [which company consolidated with the Congaree Co. into the Consolidated Co., which in turn, by proper statutory authority acquired the Horse Car Company], the City of Columbia, by an Ordinance of 1892 (R. 838), provided that,

"the powers and privileges heretofore granted to the Columbia Street Railway Co. [Horse Car Co.] are hereby conferred upon the former company [Consolidated Co.] and the said company shall be subject to all the duties, liabilities, restrictions and regulations now or hereafter prescribed for said Columbia Street Railway Company [Horse Car Co.]."

Section 562. "The Columbia Electric Street Railway, Light and Power Company [Consolidated Co.] shall have the privilege of using electricity as a motive power for its cars, and the further privilege of laying two tracks . . . ; and in all other respects said company is to have the rights and privileges conferred upon the Columbia Street Railway Company [Horse

Car Co.], and be subject to the restrictions and conditions hereinbefore prescribed for said company."

The ordinances with respect to the Horse Car Co., which were thus, by reference, applied to the Consolidated Co. merely "authorized" the Horse Car Co. to lay its tracks on certain streets (R. 833); prescribed the gauge of the tracks, and that they should be laid as prescribed by the city surveyors; made stipulations as to how the tracks should be laid and the streets kept in repair; and prescribed the duties of the drivers, how the cars should be numbered and lighted, and that they should be run every hour from 7 A. M. to 9 P. M. with various penalties for violation of the ordinance provisions.

South Carolina insists that as the terms of this 1886 ordinance were adopted, by reference, as one of the conditions on which the Consolidated Co. was given permission to use the city streets, it constitutes an *obligation* on the part of the Consolidated Co. to operate its street railway system (*a*) *in perpetuity* and (*b*) regardless of losses in operation.

The provisions of these city ordinances are merely the usual regulatory provisions with penalties of fine or imprisonment for violations thereof, which are customarily imposed in this country as police regulations of public service companies. They do *not* constitute contracts binding the corporation to operate its cars *regardless of losses.* The ordinances do not supersede the establishment rule that a public service corporation

is not required to devote its property to the public use upon unremunerative conditions.

The 1886 and 1892 Ordinances just reviewed, as well as the similar Ordinances of 1895, 1896, 1903, 1904, 1907, 1921 [providing for extensions of the lines of railway and miscellaneous regulations of operation, such as separate accommodations for whites and blacks, prohibiting disorderly conduct, providing for smoking cars, fenders, etc. (R. 839-845)], *contain no rate provisions or time requirement for operation.* Such Ordinances can stand on no higher plane than the ordinary *permissive franchise* granted by Statute, which as heretofore shown, this Court has held does not require continued operation at a loss (p. 21, *supra*).

If we assume that such City Ordinances created contractual rights in a sense (to-wit: that having accepted permission to use the streets upon the terms of such Ordinances, the street railway will be deemed by contract to have *agreed to comply* therewith so long as it continues to operate), still it is clear that such Ordinances *do not impose any obligation to operate at a loss.* That ordinances of this character are *not* contracts which require continued operation at a loss, has been the uniform holding of the State Courts (*Potter Matlock Trust Co.* v. *Warren County,* 182 Ky. 840; *Mt. Carmel Public Utility Co.* v. *Public Utilities Comm.,* 297 Ill. 303; *Northern Illinois L. & T. Co.* v. *Illinois Commerce Com.,* 302 Ill. 11; *Charleston-Isle of Palms Traction Co.* v. *Shealy,* 266 Fed. 406).

South Carolina relies upon *Columbus Ry. & Power Co.* v. *Columbus,* 249 U. S. 399, as authority for holding that the Consolidated Co. had *contracted* with the City of Columbia to operate *in perpetuity, regardless of losses.*

In order to understand exactly what the *Columbus* case decided, it will be useful first to review *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S. 517, on which the *Columbus* case is largely rested.

In the *Cleveland* case, an ordinance permitted the Kinsman Street Company to charge, over its limited lines, not more than 5c. The West Side Company had a 25-year franchise that would expire February 10, 1908. By Ordinances of 1885, 1887, 1892, and 1893, the City consented to the consolidation of these roads and authorized an extension of line (194 U. S., at 526),

> "but on the express condition that no increase of fare shall be charged by said Railroad Company on any part of its main line or on said extension, and so that but one fare, not to exceed 5c, shall be charged between any points on said Company's main line or extension, including the extension herein granted, and said Company shall sell tickets on its cars as follows: 11 for 50c and 22 for $1; and the right herein granted shall terminate with the present grant of the main line, to-wit: on the 10th day of February, 1908."

As the result of the various ordinances and consolidations, the corporations ceased to charge a 5c fare for riding over the limited lines covered by the Kinsman Street Ordinance of 1879, and charged a 5c fare for

riding over the entire system, with the tickets and transfers as provided in the other ordinances.

Cleveland passed an 1898 Ordinance, seeking to reduce the fare over the Kinsman Street line to *four* cents. The question involved was whether the 1885 and subsequent Ordinances constituted a contract between the Railroad Company and the City for a *five* cent fare over all parts of the consolidated lines for the period terminating February 10, 1908.

The Court held that a binding contract existed between the City and the Railroad, for a *five* cent fare, which could not be modified until February 10, 1908; and in reaching that conclusion it relied upon the following elements:

(*a*) That the Ordinance specifically provided for a *rate of fare;*

(*b*) That the Ordinance was required to be *accepted in writing* by the Railroad Companies, and such acceptance *filed* with the City;

(*c*) That the "right herein granted *shall terminate* with the present grant of the main line, to-wit: on the 10th day of February, 1908";

(*d*) That no reservation was made of a right to alter;

(*e*) That certain existing rights of the corporations were surrendered and benefits conferred upon the public, *i. e.*, the Companies ceased to charge 5c for the limited Kinsman Street route, but charged only 5c for a ride over the entire system;

(*f*) That obligations were imposed upon the corporations to continue such benefits during the stipulated time.

On account of those elements, this Court held that the Ordinances (194 U. S. at 536)—

"were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged."

In the *Columbus* case (249 U. S. 399), the City of Columbus, in 1901, passed two ordinances, each for a term of 25 years, granting the right to operate over certain specified streets for 25 years, and fixing certain specific rates of fare. The ordinances obligated the Company, during the 25 year life of the franchise, to furnish adequate service, to run cars on certain streets, limited the fares to specific amounts, and under one ordinance required the company to remove the tracks and leave the streets in good condition at the expiration of the period; and under the other ordinance gave the City an option to purchase at the expiration of the term.

In 1918, the Company surrendered its 1901 franchises, and attempted to enjoin the City from forcing the Company to operate on the streets covered by the 1901 franchise at the rates specified therein, claiming that such rates were confiscatory.

This Court pointed out that in the *Cleveland* case, it had held that the acceptance of the ordinances governing rates of fare constituted a binding contract upon both the City and the Company, quoting from its former opinion as follows (249 U. S. at 408):

"In reason, the conclusion that contracts were engendered, would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a

right to alter, that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged (194 U. S. 536)."

Applying that rule to the Columbus situation, the Court pointed out that the Columbus ordinances were specific in their terms, obligated the Company during the life of the franchise to do certain things, to charge certain fares and no more, and that the grant was expressly limited to 25 years, with the right in the City to purchase at the expiration of that time. It thus announced its conclusion (249 U. S. at 409):

"We can have no doubt that under the authority of the laws referred to and in view of the terms of the ordinances in question and the acceptances by the grantees, the City of Columbus made valid and binding contracts with the Companies, binding for the term of 25 years. By these contracts, obligatory alike upon the City and the Company, the City granted the right to use the streets and the Company bound itself to furnish the contemplated service at the rates of fare fixed in the ordinance. We cannot agree

with the contention of the appellant that these were permissive franchises, granted and accepted with the right upon the part of the Company to abandon the uses and purposes for which the franchises were granted, because the rates fixed became unremunerative as alleged in the amended bill. The authority under which the City acted came from the State and was granted by proper statutes passed for that purpose. The contracts were made between the City and the Company and became mutually binding for the period named in the ordinances. . . . Nor is there any allegation establishing the fact that taking the whole term together the contracts will be necessarily unprofitable. . . . In the present case the terms of the contract are not doubtful. The term for which the Company was given the right to use the streets of the City was definitely stated, and the terms, including the rates of fare which the Company might charge, were explicitly laid down."

The differences between the Cleveland and Columbus cases on the one hand, and the case at bar, on the other hand, may be thus briefly summarized.

1. In the *Cleveland* and *Columbus* cases, the franchises were for a fixed, definite term; *whereas,* in the case at bar, there was a mere permission, with no term fixed.

2. In the *Cleveland* and *Columbus* cases, a specific rate of fare was fixed, to last for a definite stated time; *whereas,* in the case at bar, no rate of fare is fixed.

3. In the *Cleveland* case the Company surrendered its existing right to charge 5c for the limited Kinsman Street line, and obligated itself to continue that benefit

during a fixed term of 25 years; *whereas,* in the case at bar, the Company surrendered nothing that it already possessed, and made no promise with respect thereto.

4. In both the *Cleveland* and *Columbus* cases, the Company was required to make a specific and formal written acceptance of the ordinances; *whereas,* in the case at bar, there was no acceptance, but merely the permissive use of the right conferred.

5. In the *Columbus* case, the Company did not seek to surrender and abandon its entire street railway franchise; *whereas,* in the case at bar, the Company has abandoned its entire street railway business.

6. In the *Columbus* case, the Company sought to hold on to its street railway business and to prevent any interference with it charging a higher rate of fare; *whereas,* in the case at bar, the Company is not seeking a higher rate of fare, but has abandoned its entire business, because it can only be operated at a heavy loss.

Where a rate of fare *is* fixed by a franchise ordinance (which in the particular case is held to constitute a contract between the parties), then the fact that such rate of fare does not provide a proper rate of return on the investment is immaterial and furnishes no basis for a claim that it is confiscatory under the Federal Constitution (*Paducah* v. *Paducah R. Co.,* 261 U. S. 267). This rule was the basis of the decision in the *Columbus* case, which refused an increase of fare under a contract ordinance.

Where *no* rate of fare is fixed, a different rule applies. Here, *no* rate of fare was fixed by any statute or ordinance; and consequently there was no contract to operate at any specific rate of fare, as was the case in the *Cleveland* and *Columbus* cases. Therefore, in the

case at bar, the general rule applies that a public utility (not having contracted to operate at a specific rate of fare) is not required to continue in the public service at a loss; and this is because if a public service corporation should be required to operate at a loss, its property would be taken for public use without just compensation, to-wit: without due process of law (*Smyth* v. *Ames*, 169 U. S. 466; *R. R. Comm.* v. *Eastern Tex. R. R. Co.*, 264 U. S. 79, 85).

An illustration of a converse situation will be illuminating.

Suppose the City of Columbia were seeking to prevent the Consolidated Co. from increasing its fare; and on final hearing it appeared that the existing rate of fare *was confiscatory*. Certainly the 1892 Ordinances of the City of Columbia *would not prevent* such an increase. That Ordinance, and the subsequent ordinances along the same line, would constitute no justification for such confiscation. Those Ordinances did not specify a fixed rate of fare; and, therefore, the Company would be entitled to have a compensatory rate under the general rule laid down by this Court.

If it appears that there is no rate of fare which will secure an adequate return, or any return (but would result in an operating *loss*), it necessarily follows that such Ordinances would constitute no justification for requiring continued operation. This is what the Court had in mind when, in the *Eastern Texas R. R. Co.* case, it said (264 U. S., at 85):

> "The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public *shall supply sufficient traffic on a reasonable rate basis to yield a fair return.* And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law."

That is the principle on which the Consolidated Co. has acted. The South Carolina public *would not supply a sufficient traffic which, at a reasonable rate basis, would yield a fair return on the investment.* Indeed, as has been repeatedly emphasized in this Brief, the traffic was not even sufficient to pay operating expenses, but imposed an enormous annual loss upon the owners of the property. Seven years' experience developed, not only with reasonable certainty, but with apodictic certainty that future operation would be at a loss; and, therefore, the Consolidated Co. discontinued operations, in order that it might get out of the property by salvage what was left—as this Court has held it had the right to do.

3. *Private contracts for line extensions, etc.* As the facts are slightly different with respect to the different contracts, they will be dealt with separately.

(*a*) *Columbia Land & Investment Co.* By a contract of April 16, 1900, the Land Co. agreed (1) to pay

for an extension of the railway line to the Land Co.'s development, with an option in the Consolidated Co. (after two years), to purchase the line at cost; and (2) if it did not purchase it, then to lease it for 99 years; and the Consolidated Co. agreed (R. 1063)

> "to operate the said extension with its electric trolley cars, running at least one car per hour over said extension each way between the hours of 7:30 A. M. and 8 P. M. daily such operation to begin as soon as said line is constructed and to continue for two years thereafter, and during said period the party of the first part [Consolidated Co.] agrees to maintain the said extension in thoroughly good order. . . . [And at the expiration of the two year period, if it did not buy the line], then it covenants and agrees to take a lease of such extension for the period of 99 years, binding itself to operate the said line in the manner prescribed for the operation thereof during the period of two years above stipulated for, and binding itself to maintain in thorough repair the said line and to pay therefor, semi-annually, as a rental for said line, a sum equivalent to the interest at the rate of 6% per annum upon the cost of construction of said line: *Provided, however,* that the party of the first part shall have the option to purchase the said line at any time during the term of said lease at a price equivalent to the cost of the construction thereof, as above stipulated, together with interest thereon."

On September 6, 1902, at the end of the two-year period, the Consolidated Co. leased the line for 99 years, agreeing to maintain the railway during the period of the lease (R. 864-868), with the option of pur-

chasing the line for $7,409.57 at any time during the lease (R. 868).

On June 30, 1909, the Consolidated Co. exercised its option to purchase the line for $7,409.57, paid that consideration, and received an absolute warranty deed from the Land Co. for the railway line, but *without* any undertaking or covenant *on the part of the Consolidated Co.* (R. 1066-1067).

The effect of the whole transaction was that the Land Co. first paid for the cost of the line extension; the Consolidated Co. leased the line for 99 years, agreeing in the *lease* to maintain and operate it "during the continuance of this lease and to the end thereof" (R. 867), but with a reserved option to *purchase* the line. It purchased the line, obtained an absolute deed therefor, with no obligation on its own part. Thereupon, the lease, with all of its obligations, terminated and became merged in the Consolidated Co.

(*b*) *North Columbia Land Co.* By contract dated August 24, 1906 (R. 851), it was agreed (1) that the Land Co. would cause to be conveyed to the Consolidated Co. a short existing railway line of a certain Improvement company; (2) that the Consolidated Co. would extend such line to the Land Co.'s development; (3) that the Land Co. would reimburse the Consolidated Co. for the cost of such extension; (4) that the Consolidated Co. would deliver its own bonds to the Land Co. at par to reimburse it, which bonds were subsequently paid off so that the Land Co. was entirely re-

imbursed for its expenditures; and (5) that the Consolidated Co.

> "Will thenceforth maintain and keep the same in good condition and repair, and will likewise after the proposed extension is completed as herein provided thenceforth maintain and keep it in good condition and repair, and run and operate street railway cars over the said line and extension in connection with its lines of street railway in and near the said City of Columbia on convenient and reasonable schedules of not less than one car for every hour from 8 o'clock in the morning to 8 o'clock at night, and as much later and oftener as travel will warrant, of each day, at one fare of not more than 5c for each passenger from and to any of the usual stopping places on any of its lines including the line of the said Improvement Co. and the proposed extension; it being expressly understood that one of the chief purposes moving the said Land Co. to make this proposition is that it may secure one fare of not more than 5c for each passenger going to and from its land through a part of which the proposed extension is to run."

The Consolidated Co. operated the railroad for twenty-one years, to wit, from 1906 to 1927 (R. 302, 371, 382).

The Consolidated Co. contends:

First: By the contract with the Land Co., the Consolidated Co. did not agree to operate and maintain its entire line, but only (*a*) to operate and maintain the line acquired from the Improvement Co. and the newly built extension thereof to the Land Co.'s prop-

erty; and (*b*) even as to that, only that it would be so run *"in connection with its lines of street railway in and near the said City of Columbia"*; and when its Columbia lines were abandoned the obligation to run cars on the extensions automatically terminated.

Second: The contract did not require a *perpetual* operation of the road. The Consolidated Co. operated the road for *twenty-one years* (1906-1927), and the contract has been fully performed by the operation for that length of time.

In *Texas Railway Co.* v. *Marshall,* 136 U. S. 393, a city gave to a railroad $300,000 in county bonds and 66 acres of land within the city limits, in consideration of which, the railroad agreed to *"permanently* establish its eastern terminus and Texas office at the City of Marshall" and to "establish and construct at said City the main machine shops and car works of said Railway Company." Eight years later, the railroad abandoned the city as its terminus and moved its machine shops and offices elsewhere. On a bill to enforce the agreement, the lower court (while not requiring the restoration of anything that had been actually abandoned), enjoined the railroad from removing any more offices from the City, and required it to continue those which remained there, and otherwise to perform the contract.

The decree was reversed on both original and cross-appeals, and it was held that the contract had been performed by keeping the shops going for eight years; that even an agreement to "permanently establish" the offices in that City was complied with by main-

taining them for eight years; and that the contract should not be construed to require the perpetual maintenance of the offices and shops.

The Court said, at page 402:

> "If, however, the City desired something more than this, if it desired to make sure that these establishments should forever remain within the limits of the City of Marshall, and that the Railroad Company should be bound to keep them there forever, such an extraordinary obligation should have been acknowledged in words which admitted of no controversy. It would have been very easy to have inserted into this contract language which forbade the Company from ever removing the terminus of the road to some other point, or from ever removing or ceasing to use the depot, or the car and machine shops, and thus have made the obligation perpetual. . . . The word 'permanent' does not mean forever, or lasting forever, or existing forever. The language used is to be considered according to its nature and its relation to the subject matter of the contract. . . ."

When the Consolidated Co. operated the line acquired from the Improvement Co. as well as the extension, for twenty-one years in connection with its principal lines in the City of Columbia, it did all that it was required to do under its contract. (See also *Jones* v. *N. N. & M. V. Co.*, 65 Fed. 736; *Bryon* v. *Louisville, Etc., R. Co.*, 244 Fed. 650; *Lucas* v. *New York, N. H. & H. R. Co.*, 140 Fed. 438; *Scheller* v. *Tacoma R. Co.*, 108 Wash. 348; *L. & N. R. Co.* v. *Johnson*, 207 Ky. 813;

Little Rock, Etc., R. Co. v. *Birnie,* 59 Ark. 66; *Jefferson, Etc., R. Co.* v. *Barbour,* 89 Ind. 375; *Maryland & P. R. Co.* v. *Silder,* 110 Md. 510; *Oldham* v. *Southern R. Co.,* 210 Tenn. C. C. A. 644; *Childs* v. *City of Columbia,* 87 S. C. 566.)

Franklin Telegraph Co. v. *Harrison,* 145 U. S. 459, is not inconsistent with this conclusion. In that case the Court, after a consideration of the terms of the contract in question, found that the circumstances showed that there was no intention that the contract in issue might be terminated by the Telegraph Co. The decision in that case must be confined to its particular facts. The Court was not laying down any general principle of law but was endeavoring to carry out the intention of the parties as disclosed by the facts.

Courts will give a reasonable construction to the language of parties to a contract. It is entirely unreasonable to suppose that the parties intended that for the mere temporary loan of the cost of construction by the Land Co., the Consolidated Co. undertook to operate its entire system perpetually, involving a loss in excess of $100,000 per year.

This is not a suit in equity for the specific performance of any contract which the North Columbia Land Co. might be entitled to enforce. Although it was allowed to intervene in the *mandamus* suit, it merely joined in a prayer for the relief prayed for in the State's petition for mandamus; and consequently its rights cannot here be tested by the same rules as might apply in a suit in equity for the specific performance

of a private contract. The contract, if enforced in this proceeding, must be enforced as imposing public obligations, which are enforceable at the instance of the State. That such agreements do not inure to the benefit of the public is well settled. (*German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U. S. 220; *Ancrum* v. *Camden Water Co.*, 82 S. C. 284.) In this connection, the consequences of a contrary holding must be considered. If the contract is to be treated as one to which the public was a party, the parties to the contract could not in any respect alter the obligation. That the parties did not so consider the contract is evidence from the fact that such amendments were made (R. 854).

The purpose of these agreements is evident. They were made for the benefit of the Land Companies, who were benefitted thereby, in that the accessibility of their lands made them more saleable; and it is obvious that they were intended solely for the benefit of the parties to the contract.

(*c*) *Shandon Annex Co.* By contract dated May 30, 1910, it was agreed that the Consolidated Co. would build an extension for the Shandon Co. at the latter's expense; that when completed, the Shandon Co. would deliver to the Consolidated Co. an "*absolute and unqualified* transfer and conveyance" of the railroad and right-of-way, and that the Consolidated Co. would operate the railway on a schedule therein set out at a 5c fare (R. 855).

The Town of Shandon passed an Ordinance giving its consent for the Shandon Co. to operate through its

streets (R. 862), but it contained such onerous obligations that the Consolidated Co. was never willing to accept a conveyance of the railway burdened with these obligations (R. 516, 517). The conveyance was never made to the Consolidated Co.

The Shandon Co. later went into bankruptcy and is not a party to this proceeding. The Special Referee held that the testimony was incomplete; that the deed tendered by the Shandon Co. was not before him; and that he could not definitely determine the extent of the rights and obligations of the parties (R. 182). The Shandon Co. has never performed its contract. The operation of the road by the Consolidated Co. for so many years was a sufficient compliance with its obligations, if any, under the contract. The same rules apply here as in the case of the North Columbia Land Co. (p. 44, *supra*).

(*d*) *Rights-of-Way.* There are two grants of rights-of-way (R. 845-847); but as they contained *no covenants* on the part of the Consolidated Co., they cannot be held to create a contract by which the Consolidated Co. agreed to operate its road in perpetuity regardless of losses. If a simple right-of-way deed creates a contract by which the railroad must in perpetuity operate its road, then no railway line could ever be abandoned (*Bryan* v. *L. & N. R. Co.*, 244 Fed. 650).

FOURTH POINT.

The Consolidated Co. possessed two separate and independent franchises—one for electric light and power derived from the Congaree Co. and the other for an electric street railway derived from the Original Electric Ry. Co.

If either franchise could not be operated, except at a loss, the company could abandon such franchise, while retaining and operating its other independent franchise.

I.

Upon the consolidation of the Congaree Co. (R. 813) with the Original Electric Ry. Co. (R. 811), the respective separate franchises of those two constituent companies continued to exist separately after the consolidation (R. 809). The separate franchises became vested in the Consolidated Co., which thereafter was entitled to exercise them with respect to the property to which they respectively applied, to the same extent, and no more, that the respective constituents exercised such franchises before the consolidation. There is nothing in the Consolidated Act which purports in the slightest degree, to grant to the Consolidated Co. any new or additional powers, or indeed anything in the way of a franchise other than the right "to be" and to receive the franchises of the constituent companies which were consolidated into the Consolidated Co.

The Consolidation Act (R. 809) is a mere authority to two corporations to consolidate, thereby creating a new consolidated corporation, with a franchise "to be,"

in which is vested the property and franchises of the two constituents. It created no new franchise (except the power "to be"), and it did not purport to grant a combined franchise to the new company to occupy streets with structures for the street railway, gas or electric business. It merely authorized the new corporation to become the owner of the pre-existing, independent and separate franchises of the two constituent corporations, subject as to each to all the provisions of such franchises (*Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 661; *New Orleans Gas. Co.* v. *Louisiana Gas Co.*, 115 U. S. 650).

In *Green County* v. *Conness*, 109 U. S. 104, 106, it was said, with reference to the transfer by consolidation of the franchises of one company to a consolidated company,

> "If only a sale of the road to another company had been authorized and made, then it might very plausibly have been contended that the purchasing company took and held it under its own charter only, without the franchises and privileges connected with it in the hands of the vendor company; but 'consolidation' is not sale, and when two companies are authorized to consolidate their road it is to be presumed that *the franchises and privileges of each continue to exist* in respect to the several roads so consolidated."

The 1925 Enabling Act (R. 806), shows a legislative recognition of the *separateness* of the franchises, in that it authorizes the Consolidated Co. to sell to any of its subsidiaries or to Broad River,

"all *or any part* of their respective properties, assets, franchises and charter or other rights;" and authorizes each company "to purchase and to receive and hold all, *or any part,* of the properties, assets, franchises and charter, or other rights"; and authorizes any company which becomes "the purchaser of *any* of such property, assets, franchises and charter or other rights . . . to be vested with the same."

There is nothing in that Consolidation Act which imposes upon the Consolidated Co. any special or peculiar contractual obligation to operate a public service business at a loss.

The charter of the constituent Original Electric Ry. Co. was purely *permissive.* It provided (R. 812, §5):

Section 5. "That the said company *shall have power* to construct or acquire single or double railway tracks, of such gauge as they may elect, through any street or streets of the City of Columbia, *with consent of City Council,* and to extend the same five miles into the country, in any direction or directions they may wish, from the State Capitol. And the said company is *authorized and empowered to contract* for and provide electric power for any other purpose or purposes.

Section 6. That said company *shall have power* to operate their cars in the transportation of passengers and freight over the tracks they may construct or acquire, in said City, with electric power, in suitable carriages, and at such rates as may be fixed upon in the by-laws of the same."

The charter of the Original Electric Ry. Co. was thus *purely permissive*. It imposed no special or contractual obligation upon it to continue to operate *at a loss*. Similarly the Consolidation Act did nothing more than vest in the Consolidated Co. such permissive franchise or rights as the constituent company already possessed.

It is too plain for argument that the Consolidated Co. did not, by virtue of any transfer or acquisition from the Original Electric Ry. Co., succeed to, or assume, any contractual *obligation* with the State to operate the street car system *at a loss*—for the obvious reason that the constituent company itself had no such obligation.

On the other hand, the South Carolina Court held (R. 214, 215, 218), that the Consolidation Act,

> "not only created a corporation but *conferred a franchise* and the right to do all of the things set forth therein . . . the powers and privileges held by this new corporation were derived from this Act of incorporation, and were not the mere continuation of the powers formerly granted to the consolidating corporations. 'It was the creation *de novo* of a new corporation with new powers and privileges,' " citing *Atlantic & Gulf R. R. Co.* v. *Georgia*, 98 U. S. 359, and *Rochester R. R. Co.* v. *City of Rochester*, 205 U. S. 236.

In attempting to state the terms of the Consolidation Act, the Court erroneously incorporated into it, §2 of the 1887 Congaree Co. charter, §§5, 6 of the 1890 Original Electric Ry. Co. charter, and §§5, 6 of the 1882

Horse Car Co. charter, which creates a totally erroneous idea of what is actually contained in the Consolidation Act.*

Railroad Co. v. *Georgia,* 98 U. S. 359, and *Rochester Railway Co.* v. *Rochester,* 205 U. S. 236, are not in point, as the charter provisions there involved relate to immunity from taxation, which is not a franchise or privilege that passes by consolidation to the consolidated company.

II.

The Consolidated Co. was engaged in two separate businesses; one was the electric light and power business, the franchise for which it had derived from the Congaree Co.; the other was the electric street railway business, the franchise for which it had derived from the Original Electric Ry. Co.

The Consolidated Co. could not be compelled to spend the money it made from the light and power business upon its street railway business. If it could be compelled to do that, the result would be that patrons of light and power would be required to pay exorbitant rates for that service, in order to enable other persons to have a street railway service.

In *Brooks-Scanlon Co.* v. *R. R. Comm.,* 251 U. S. 396, the Brooks-Scanlon Co. purchased a narrow gauge logging railroad, and then leased it to a railway company which it caused to be organized. Later it termi-

*The Petition for Rehearing (R. 266) called attention to this error, which was occasioned by the Court simply carrying into the opinion the argument of counsel's brief; but the Court did not correct the opinion.

nated the lease and the railway company went out of business and sold its rolling stock.

Subsequently, the Louisiana Railroad Commission issued an order requiring the Brooks-Scanlon Co. to continue the operation of the railroad, either directly or through the railway company, which it controlled.

The State Court held that although the railroad showed a loss, the proper test was "the net result of the whole enterprise—the entire business of the corporation." This Court reversed the State Court, and held that the Brooks-Scanlon Co. could not be compelled to obey the Railroad Commission's order, saying:

> "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. On this point it is enough to refer to *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595, 599, 600, 604, and *Norfolk & Western Ry. Co.* v. *West Virginia,* 236 U. S. 605, 609, 614. It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfill an obligation imposed by the charter even though fulfillment in that particular may cause a loss. *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262, 276, 278. But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that, than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it.

If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. *Munn* v. *Illinois*, 94 U. S. 113, 126. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return."

In *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, the State fixed maximum intrastate rates on coal in carload lots. This Court held that those rates could not be enforced against the carriers, because they did not provide proper compensation to the carrier for the use of its property in the public service. The Court said:

"The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its

property burdens that are not incident to its engagement."

The Congaree franchise for electric light and power gave to the Consolidated Co. the right to carry on a light and power business. That franchise was limited to that business only. The public interest cannot impose upon the business operated under that franchise, the additional burden of paying losses incurred in carrying on an entirely different business, the franchise for which the Consolidated Co. derived from the Original Electric Ry. Co.

This idea is well illustrated by Mr. Justice HUGHES' language in *Northern Pacific Ry. Co.* v. *North Dakota*, at page 596:

> "The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. . . . But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the

> property to public uses upon terms to which the carrier had in no way agreed."

The Consolidated Co. agreed, by its acceptance of the Congaree franchise, that it would carry on a light and power business at reasonable rates that would provide a fair compensation to it, based upon the reasonable value of the property devoted to that public use. It did *not* agree that it would devote that property not only to the furnishing of light and power to patrons, but also to the furnishing of street railway service, telephone service, or any other service.

In *Norf. & West. Ry.* v. *West Virginia,* 236 U. S. 605, it was held that a 2c rate for passenger traffic afforded such a small margin of profit that the railroad could not be compelled, by the State, to carry passengers at that low rate. In the course of the opinion, Mr. Justice HUGHES said (p. 609):

> "Thus, it would not be contended that the State might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service."

The rule that a company owning two or more utilities cannot be compelled to operate *one* at a loss, because its *total* business shows *no* loss, is sustained by well reasoned decisions of various courts (*Northern Ill. L. & T. Co.* v. *Ill. Commerce Comm.,* 302 Ill. 11; *Mt. Carmel Public Utility & Service Co.* v. *Public Util-*

ities Comm., 297 Ill. 303; *Ill. Trust & Sav. Bank* v. *Doud,* 105 Fed. 123).

In *Mt. Carmel Public Utility &c. Co.* v. *Public U. Comm.,* 297 Ill. 303, the Mt. Carmel Co. was engaged in the business of furnishing gas, electricity, water and heat—the heat being furnished under a 1906 Ordinance.

The heating business proving unprofitable, the Company petitioned the Public Utilities Commission for permission to abandon its heating service and to surrender its franchise. The Public Utilities Commission directed the Mt. Carmel Co. to resume the rendering of heat service immediately. The Court held that it could not be required to do so, saying:

> "The state has no power to compel a corporation engaged in operating a public utility to serve the public without a reasonable compensation. . . . If the corporation is required by any act or proceeding to devote to the public the use of its property without compensation or without any reasonable compensation, it has been deprived of its property and of the equal protection of the law. Where a public utility corporation is engaged in furnishing to the public through various departments of its business, different kinds of service, it cannot be compelled to carry on a branch of its business which furnishes one kind of such service at a loss, even though at the same time its whole business may be conducted at a profit. *Brooks-Scanlon Co.* v. *Railroad Com.,* 251 U. S. 396; *Northern Pacific Railroad Co.* v. *North Dakota,* 236 U. S. 585; *Norfolk & Western Railroad Co.* v.

West Virginia, 236 U. S. 605. . . . The evidence taken indicated that the heating plant was practically worthless; that to enable it to render satisfactory service during the season would require substantially its entire reconstruction, and would require an expenditure of $100,000—an amount equal to the value of the plant—and that the plant would not then pay for its operation and any return on the investment. This was the condition as shown *prima facie* by the evidence, and such a condition would justify the petition of the company to abandon the service. . . . An order without investigation—with any finding of facts on which it was based—requiring practically the construction, at great expense, of a new plant which could not be expected to earn a reasonable return on the investment, was not reasonable but amounted to requiring the appellant to devote its property to the public use without regard to compensation."

In *Northern Ill. Light & T. Co.* v. *Ill. Com. Com'n,* 302 Ill. 11, a traction company petitioned for leave to discontinue its street railway service on certain streets in the Town of Ottumwa. In reversing the order of the Commerce Commission, which had permitted discontinuance of service on only *one* of the streets, the Court said:

"It was also held in that case [*Mt. Carmel Utility Co.* v. *Public U. Comm.*] that, where a public utility is engaged in furnishing to the public, through various departments of its business, different kinds of service, it cannot be compelled to

carry on a branch of its business which furnishes one kind of such service at a loss, although at the same time its whole business may be conducted at a profit. The question whether or not appellant in this case is making a profit in its other utility is not proper for consideration in this case. . . . The question in this case is not one of rate making, but of the right to abandon a part of the utility on the ground that the operation of such part will amount to a confiscatory rate on the whole, or a rate upon the whole that yields such a small return that the owner of the utility would substantially suffer a loss it it were required to continue, or a rate that returns so small a profit that no reasonable business man would accept and continue such operation," citing and quoting *Brooks-Scanlon Co.* v. *Railroad Comm.*, 251 U. S. 396, and *Bullock* v. *Florida*, 254 U. S. 514.

In *Illinois Trust & Savings Bank* v. *Doud*, 105 Fed. 123, the Circuit Court of Appeals for the Eighth Circuit (SANBORN, J.) said:

"The proof is conclusive that the railway was conducting three classes of business,—operating a street railway by electricity, furnishing steam heat and power, and furnishing electric light; that it could conduct either one or two of these occupations without the others or the other, and that it had ample power, without the new building and machinery, to operate its street railway, to furnish its customers with steam heat and power, and to furnish some of its customers with electric light. . . . It could have abandoned the business of furnishing electric light entirely, and have con-

tinued to operate its street railway, and to furnish steam heat and power to its customers, or it could have abandoned all its business but the operation of its street railway, and it would still have been a going concern. . . . Under its articles of incorporation the railway derived from the state power (1) to buy, construct, sell, lease, and operate street railways in Ottumwa; (2) to buy, construct, sell, lease, and operate a plant for furnishing steam heat and power; and (3) to buy, construct, sell, lease, and operate a plant to supply and furnish electric light to the city of Ottumwa and its inhabitants. This corporation derived the privilege of erecting its poles and stringing its wires along the streets of Ottumwa to furnish electric light from a set of ordinances entirely distinct from those which permitted the use of the streets of the city for its street railway and for its pipes to furnish steam heat and power. The ordinances relative to its electric lighting imposed no conditions upon its business of furnishing steam heat and power, or upon its business of operating the street railway. Now, conceding that the franchises of a public or *quasi* public corporation may be forfeited for misuse or renunciation, still the entire failure of this corporation to exercise its power to furnish electric light would have furnished no ground for the forfeiture of its franchises to furnish steam heat and power and to operate its street railway. Another of the franchises granted to this corporation under its articles was the power to buy, hold, use, and sell the corporate stock of any competing corporations in the city of Ottumwa. None of the franchises to operate a street railway, to furnish

electricity, or to furnish steam heat and power could have been forfeited because the corporation had not exercised its power to purchase the stock of rival corporations. No corporation is required to exercise all the powers granted to it by its organic law as a condition of the exercise of some of them unless that requirement is expressly made by some statute or ordinance under which it derives some of its powers or privileges, or the powers are inseparably connected with each other."

FIFTH POINT.

The Broad River Power Co. purchased the electric light and power franchise from the Consolidated Co. pursuant to express statutory authority; and it cannot be compelled to operate a street railway system which it never purchased.

Before the passage of the 1925 Enabling Act, the Consolidated Co. owned and was operating under (1) the street railway franchise which it had derived on consolidation from the Original Electric Ry. Co., and (2) the electric light and power franchise which it had derived on consolidation from the Congaree Co.

The Broad River Power Co. was an independent corporation, having ample corporate powers to operate an electric light and power business in Columbia; but there was no existing statutory authority which would authorize the Consolidated Co. to sell any of its franchises to Broad River. At that time (1924), the stock of the Consolidated Co. had been purchased by the so-

called Barstow interests, which also controlled Broad River.

The Consolidated Co.'s electric properties were in bad condition, and there was an acute shortage of power in the City of Columbia and its vicinity. In order to finance the necessary improvements and extensions of the electric light and power plant, it was essential that the electric and gas properties be conveyed to a new company totally disassociated from the street railway operations, which for years had been operated at a tremendous loss. No investors or financial houses would furnish money to a company operating an electric light and power business in this condition, which was at the same time operating a street railway business whose huge losses in operation would be saddled on the electric light and power business (R. 526, 547, 663, 669, 670, 696).

Thereupon, the South Carolina Legislature adopted the 1925 Enabling Act, which expressly authorized the Consolidated Co. and its subsidiaries (R. 806).

> "to merge or consolidate with or *to sell,* transfer and convey . . . *to the Broad River Power Company* all or *any part* of their respective properties, assets, franchises and charter or other rights, and . . . the Broad River Power Company *are hereby authorized* to merge or consolidate with or *to purchase and to receive and hold* all or *any part* of the properties, assets, franchises and charter or other rights of any other of said companies so sold, transferred and conveyed to it, . . . and each and *every company* so merging

or consolidating with or *becoming the purchaser of any of such property, assets, franchises and charter or other rights is hereby declared to be vested with the same* and all such . . . *sales,* transfers and conveyances *are hereby validated and confirmed.*

Section 2. Franchises.—That in furtherance of the purposes of Section 1 of this act, it is hereby declared that *all franchises* heretofore granted by the State to any of the said companies *may be transferred and assigned* in pursuance of the provisions of Section 1 of this Act, and that said franchises are hereby ratified, *confirmed* and continued in full force and effect *in the company, to which the same shall be so transferred and assigned* and that such company *shall hold the same with all the rights, powers and privileges granted to the original holder thereof,* subject *only* to the restrictions, requirements and conditions in said franchises contained."

Pursuant to that express statutory authority, the Consolidated Co. sold, transferred and conveyed to Broad River its light and power properties and franchises (Deed, R. 1070; 1118). The Broad River assumed the mortgage indebtedness of the Consolidated Co., as well as the obligations of certain subsidiaries aggregating over $7,000,000 (R. 687), and surrendered for cancellation a large amount of stock of the Consolidated Co. and ts subsidiaries (R. 687).

The Consolidated Co. expressly reserved to itself its street railway franchises, easements, rights of way and property (R. 1116).

After the conveyance the Consolidated Co. had about $75,000 current assets, $99,000 of current liabilities, and also possessed its entire physical street railway property (R. 608), which had a reproduction value of $1,750,000 (R. 134), and was assessed for taxation at $250,000 for 1926 (R. 1120) and at $357,142 for 1927 (R. 1121).

The effect of the Enabling Act and the deed made puruant thereto, was to vest in Broad River the electric light and power franchise originally granted to the Congaree Co.

As Broad River never purchased the street railway system (which was expressly *excepted* from the conveyance), it is impossible to see how Broad River can be compelled to operate, or to be jointly responsible for the operation of, a property *which it never acquired.*

Nevertheless, the South Carolina Court held that the conveyance by the Consolidated Co. to Broad River constituted a practical merger of the two companies, and made Broad River *liable,* to the same extent as the Consolidated Co., *for the future operation of the street railway system.*

It is difficult to see how a corporation which buys one property from the seller, who expressly reserves to himself another property, can be held to have been merged with the seller, so as to make such corporation liable for a property which he has expressly declined to buy.

The fact that one corporation owns stock in another does not create an identity between the two com-

panies, nor render the stockholding company the owner of the property of the other, or liable for its obligations, or create the relation of principal and agent or representative between the two (*Chicago M. & St. P. R. R.* v. *Minn. Civic Assn.*, 247 U. S. 490, 500), except in those exceptional cases, where in order to prevent fraud or other flagrant wrong, one company is held to be not an independent corporation but a mere agent of the other.

No such situation exists here. The Consolidated Co. and Broad River, pursuant to express legislative authority, *separated* the ownership of the street railway system from that of the light and power business. This was done for a purpose. It was done because the light and power business needed financial assistance in order to supply light and power to Columbia and vicinity at reasonable rates. This could not be done unless money could be raised. Money could not be raised so long as the losses of the street railway system were saddled upon the company seeking to borrow money for its light and power business. This was the occasion of the separation of interests.

Millions of dollars belonging to investors, and which never belonged to the Consolidated Co., were invested in Broad River, upon the faith of its separate identity, and upon its ownership pursuant to statutory authority, of the light and power business (R. 806; p. 9, *supra*).

The Supreme Court of South Carolina, by its decision in this case, seriously jeopardizes the rights of

the bondholders and preferred stockholders of Broad River, whose money has been used to build an enormous $4,000,000 power plant and to provide for necessary extensions, additions and betterments in order to furnish power at reasonable rates to the people of South Carolina. The decision of the South Carolina Court goes far beyond the rule which is sometimes applied to acts which are actually or constructively fraudulent, as between two corporations, one of which owns the other.

By the decision below, the investments of many persons in Broad River are now subordinated to a prior lien for the operation of a street railway with a deficit of about $150,000 per year in perpetuity.

The decision below impresses this burdensome lien for the operation of a street railway company, not only upon the property which Broad River acquired from the Consolidated Co., but upon millions of dollars of additional property, which it has acquired since, by the use of the funds of investors who would never have thought of putting any money into a street railway enterprise.

If, as held in *Brooks-Scanlon Co.* v. *Railroad Comm.*, 251 U. S. 396, a lumber company could not be compelled to use the assets employed in the lumbering business to operate a railroad owned by it at a loss, *a fortiori*, a gas and electric company cannot be compelled to exhaust its assets in operating a street railway system owned by another company. A decision imposing such an obligation of itself is so contrary to funda-

mental principles of justice as to constitute a violation of the Fourteenth Amendment.

CONCLUSION.

The judgment of the Supreme Court of South Carolina should be reversed.

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